UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TAYLOR RIDGE PAVING AND CONSTRUCTION CO.,	)	
Respondent,	)	
and	)	Case No.: 25-CA-135372
LOCAL UNION NO. 309, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA,	)	
Charging Party.	)	

TAYLOR RIDGE PAVING AND CONSTRUCTION'S MOTION FOR RECONSIDERATION OF THE BOARD'S DECISION AND ORDER

Pursuant to Section 102.48(c)(1) of the Board's Rules and Regulations, the Respondent Taylor Ridge Paving and Construction Co. ("Taylor Ridge" or "Company") moves for reconsideration of the Board's Decision and Order issued on December 16, 2017, in Taylor Ridge Paving and Construction, Co., 365 N.L.R.B. No. 168 ("Taylor Ridge"). That Decision and Order affirmed the ALJ's finding Respondent failed to properly repudiate its prehire agreement with the Charging Party.

The Board's Decision and Order failed to apply intervening Supreme Court precedent in M & G Polymers USA, LLC v. Tackett, 135 S. Ct. 926, 930 (2015), which requires construction of collective bargaining agreements to be subject to common contractual rules, a process which neither the ALJ nor the Board undertook as required. This is an extraordinary circumstance for which reconsideration should be granted.

I. BACKGROUND

The Complaint was filed on November 25, 2014. GC Ex. 1(c). The hearing took place on February 12, 2015. The ALJ's Decision issued on September 21, 2015. The Board issued its Decision and Order on December 16, 2017.

The Company and Union signed agreements on January 23, 2012, GC Exs. 2 (Associated Contractors of the Quad-Cities Agreement),19 (Memorandum of Agreement), before the Company hired any employees. On October 30, 2013, the Company sent the Union the first of two certified letters terminating its agreements with the Union effective December 31, 2013. R. Exs. 1, 2. After December 31, 2013, the Company did not comply with the terms of any union agreement. Both letters were sent to and received by the Union more than six months before the charge was filed on August 24, 2014. See R Exs. 1 (PS-Form 3811 (Green Card)); 15.

II. CONTROLLING SUPREME COURT PRECEDENT

On January 26, 2015, the Supreme Court issued its Decision in M & G Polymers USA, LLC v. Tackett, 135 S.Ct. 926 (2015). The Court held that upon expiration of a collective bargaining agreement, provisions in documents incorporated therein also terminate. That litigation involved a federal district court complaint filed under Section 301 of the Act and § 502(a)(1)(B) of ERISA. Id. at 931.

The Sixth Circuit Court of Appeals interpreted the union CBA as providing lifetime contributions to the union's health and welfare fund. It concluded when the CBA terminated by its terms, the health and welfare obligations to trust funds incorporated by the CBA did not cease, but continued. The Supreme Court

reversed.

The Supreme Court stated that collective bargaining agreements under the Labor Act are to be interpreted according to "ordinary contract" principles:

> We interpret collective-bargaining agreements, including those establishing ERISA plans, according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy. See Textile Workers v. Lincoln Mills of Ala., 353 U.S. 448, 456–457, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). "In this endeavor, as with any other contract, the parties' intentions control." Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010) (internal quotation marks omitted). "Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent." 11 R. Lord, Williston on Contracts § 30:6, p. 108 (4th ed. 2012) (Williston) (internal quotation marks omitted). In this case, the Court of Appeals applied the Yard–Man inferences to conclude that, in the absence of extrinsic evidence to the contrary, the provisions of the contract indicated an intent to vest retirees with lifetime benefits. Tackett II, 733 F.3d, at 599–600. As we now explain, those inferences conflict with ordinary principles of contract law.

135 S. Ct. at 933.

The Supreme Court condemned the Sixth Circuit's inference of 1) "an intent to vest those retiree benefits for life," in the lower court's attempt to interpret the contract "to avoid illusory promises," and 2) wrong in extending its own "context" to the negotiations that lifetime benefits "would be left to the contingencies of future negotiations." Id. at 934,

While noting the court of appeals "violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements," id. at 935, it faulted the court of appeals for "deriv[ing] its

assessment of likely behavior not from record evidence, but instead from its own suppositions about the intentions of employees, unions, and employers negotiating retiree benefits." Id.

There must be a "foundation" for "inferences....the parties must prove those customs or usages using affirmative evidentiary support in a given case." Id. Where there was no such record evidence in the case, the Supreme Court decried the action of the court of appeals: "Worse," it took "the inferences...and applied them indiscriminately across industries." Id.

Next, the Supreme Court found the court of appeal's failure to apply the general durational clause (termination provision) of the CBA to the facts "distort[s] the text of the agreement and conflict[s] with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties." Id. at 936.

From this error, the court of appeals "misapplied other traditional principles of contract law, including the illusory promises doctrine." Id. In focusing on the durational clause as subject to the illusory rule, the Supreme Court ruled "when a contract is silent as to the duration of [] benefits, a court may not infer that the parties intended those benefits to vest for life." Id. at 937.

III. THE BOARD'S FINDINGS BELOW

The Board's Decision and Order ("Decision") did not consider M & G Polymers. The Board made these determinations:

1. The Board majority disagreed with the Chairman's dissent that Taylor Ridge was an "unwitting employer" because it could not know its 2008-2012 CBA

durational provision was contrary to the MOA. The MOA was found to strip the CBA's durational provision away because Taylor Ridge was bound by the MOA to a subsequent employer association CBA that did not exist at the time Taylor Ridge signed its 2008-2012 CBA with the Union. The Board majority relied on prior case law finding "duration clauses in 8(f) agreements" enforceable under Deklewa, the MOA's reach to new area contracts yet to be negotiated could properly be incorporated in the MOA, and both contracts remained enforceable under extant Board law. The Board majority relied on cases such as Construction Labor Unlimited, Inc., 312 N.L.R.B. 364 (1993); W.J. Holloway & Son, 307 N.L.R.B. 487, 489 (1992), and Neosho Constr. Co., 305 N.L.R.B. 100, 100 (1991). Decision 3 n.7.

2. The majority agreed that because neither party to the 2008-2012 CBA (the Union or Taylor Ridge) gave timely notice of termination before December 31, 2012, the 2008-2012 CBA rolled over year-to-year until Taylor Ridge provided termination notice on October 20, 2013. But, because Taylor Ridge signed a separate MOA with a termination date of April 30, 2013, binding parties to unlisted area contracts and successor agreements whenever they may go into effect, the successor agreement signed by the employer association on April 4, 2013, without Taylor Ridge's knowledge, but effective January 1, 2013 to December 31, 2015, extended the MOA to December 31, 2015. Therefore, the Board majority reasoned the MOA incorporated the successor association CBA and that incorporation applied the 2013-2015 CBA to Taylor Ridge through December 31, 2015. GC. Ex. 6.

3. Chairman Miscimarra dissented. He noted Taylor Ridge "followed to the letter the very method for providing notice of contract termination to which the

parties had agreed." Decision 7. He concluded the majority's position finding the MOA "implicitly repealed" the durational clause of the parties 2008-12 CBA, because it "*surrender*[ed] the termination rights provided in Article 38 of the 2008-2012 Agreement and to be bound by any successor agreement." Decision 8 (emphasis in original).

4. The Chairman also found that while the MOA states it applies to area-wide agreements, "the MOA does not identify the contract to which this provision refers." Id. The MOA further does not identify when a termination "notice within the specified period of time" would be appropriately sent. Id. Because "the MOA fails to permit itself from *ever* terminating," the Chairman found the MOA circumvents Deklewa and frustrates the majority support principle for union representation if termination of the 8(f) bargaining relationship is denied. Id (emphasis in original).

IV. ARGUMENT

A. The Board's Decision Should Be Reconsidered Because its Construction of the CBA and MOA in This Case Fail to Comply With Ordinary Contract Principles Under M & G Polymers v. Tackett.

The Supreme Court now requires collective bargaining agreements to be construed under ordinary contract principles. The Board's Decision fails to do so. The Board imposed a single interpretation of contract law derived from its own decisions, i.e., the language in CBA successor clauses only, rather than ordinary contract law principles applied to provisions in the full CBA.

The Board must follow the Supreme Court's ruling that contract law defenses

exist if it considers contract language to enforce alleged statutory violations. This it failed to do here.

1. The Board Must Follow Supreme Court Precedent.

It is elemental the Board "must adhere to Supreme Court decisions." Raytheon Network Centric Systems, 365 N.L.R.B. No. 161 at 12 (2017). "[T]he Board cannot deviate from decisions of the Supreme Court, including decisions interpreting the Act." Id. at 13.

In M & G Polymers, the Supreme Court considered the CBA and its meaning in determining the existence of any contract violations under Section 301 of the Act. The Court now requires examination of labor contracts under the Act to follow ordinary contract rules.

The Board can no longer construe clauses in collective bargaining agreements "by placing a thumb on the scale in favor of" a single term as the Sixth Circuit unsuccessfully did in M & G Polymers at 935. Because indefinite continuation of a bargaining agreement is not required for Section 8(f) contracts, durational clauses should be upheld.

Like the nation's courts, the Board's contract rulings "may not infer that the parties intended those benefits to vest for life," id. at 937, e.g., here by MOA extension to any yet to be negotiated and yet to be named association agreement. By imposing a form of contract review limited to single clauses under the auspices of Section 8(a)(5) to prevent 8(f) contract termination or suspend the CBA's durational clause, the Board violates the examination process required by M & G Polymers.

Rather, the Board must construe labor contracts as a whole under the Act consistent with traditional rules of contract law, an endeavor not undertaken.

2. The Board's Decision Fails to Apply Traditional Principles of Contract Law to the CBA and MOA.

The centerpiece of the Board's application of contract language to its Decision against Taylor Ridge is the Analysis section-Part II. There, the Board agreed that parties to 8(f) agreements may terminate them under John Deklewa & Sons, 282 N.L.R.B. 1375 (1987), and employers may bind themselves to multi-employer contracts negotiated by employer associations and unions.

Considering Taylor Ridge's CBA and MOA, the Board looked solely to 1) an interpretation of the automatic renewal provision in the 2008-12 CBA to December 31, 2013, 2) the creation of a new multi-employer CBA effective January 2013 to 2015, 3) the interpretation of the MOA's successor contract language to extend itself to December 31, 2015, and therefore, 4) imposed the 2013-2015 CBA on Taylor Ridge despite its timely termination of the rolled-over 2008-12 CBA in October 2013.

For this proposition, the Board majority relied on cases involving only single CBA's, roll-over ("evergreen") clauses, and termination notices—not two agreements. In neither GEM Mgmt. Co., 339 N.L.R.B. 489, 496 (1993) (referring only that "the agreement shall automatically renew itself from year to year"); Construction Labor Unlimited, Inc., 312 N.L.R.B. 364, 367 (1993) (binding employer to current master agreement and "any successor agreements"); W.J. Holloway & Son, 307 N.L.R.B. 487, 489 (1992) (applying "successive contract" language to

successor association contract), Neosho Constr. Co., 305 N.L.R.B. 100, 100 (1991) (binding parties to master and successor agreements), and Cedar Valley Corp., 302 N.L.R.B. 823, 823, 826 (1991) ("The undersigned Employer signatory hereto who is not a member of the said Association agrees to be bound by any amendments, extensions or changes in this Agreement, and further agree to be bound by the terms and conditions of all subsequent contracts negotiated," by the union and association), are situations where a separate agreement was not considered.

In GEM Mgmt Co., Inc., 339 N.L.R.B. at 489 n.2, the majority agreed the employer was bound to changes it and the union might make in their own signed contract, but it had not "bound itself to modifications of later contracts." That majority disagreed with Member Walsh's argument that CBA renewal language could "more broadly encompass[] any future contracts negotiated by" the union and employer association not identified in the operative CBA. Id.

Here, the Board majority looked only to the renewal provisions in the CBA and MOA. The CBA was found to have been renewed for one year through December 31, 2013. Slip op at 3. It determined the MOA bound Taylor Ridge to "any" existing Association agreement "as well as "'newly negotiated contracts.'" Id. The Board made no findings the 2013-2015 contract came into existence after the 2008-12 agreement had rolled over. No further contract-based findings to deconflict the co-existence of the two agreements was addressed.

Taylor Ridge's Exception 53 objected to the ALJ's interpretation the MOA

applied to the new 2013-2015 CBA.[1] In its Exceptions Brief, Taylor Ridge explained, in part, "the Judge's conclusion the MOA continued to exist misreads Section 8 of the MOA, tying its life to all other contracts that might exist despite an actual notice terminating the MOA. That novel legal conclusion, which is not supported by any cited caselaw, would deprive an employer the right to ever opt out of coverage because notice under one agreement would not be valid under other agreements. See Hudson Valley District Bricklayer Funds v. U.W. Marx, Inc., 851 F. Supp. 133, 138 (S.D.N.Y. 1994)."

Deklewa, at 1387 (emphasis added), stated the Board's policy was to prohibit "the unilateral repudiation of the agreement until it expires or until that employer's unit employees vote to reject or change their representative. *Importantly, this limited obligation is not imposed on unwitting employers*." Chairman Miscimarra agreed that Section 8(f) obligations are "not imposed on unwitting employers." Because parties to 8(f) agreements are to "know their respective rights, privileges and obligations at all stages in their relationship," Deklewa at 1385, interpreting the MOA to impose the 2012-2015 CBA which "did not even exist at that time" "contradicts each of" Deklewa's "requirements." Slip op. at 9.

Chairman Miscimarra observed:

> No one could have known, when the Respondent signed the 2008–2012 Agreement, that the termination rights afforded in that contract would be rendered illusory by virtue of the MOA the Respondent signed the very same

[1]Exception 53 states: "Taylor Ridge excepts to the ALJ's finding that the MOA "extended both the life of the MOA and bound Taylor Ridge to the successor agreement through December 30, 2015. GC Br. P.15." Dec. 11 ll.5-7."

> day, as a result of which its contractual obligations would be deemed extended through December 31, 2015.

Id (arguing the concept is similar to a premature contract extension and therefore a nullity against an RC or RD petition filed during the window period). See Vanity Fair Mills, 256 N.L.R.B. 1104, 1106 (1981) (reviving RD petition where employees met the 90-day end-of-contract window period, but contract length was 2 years 2 months and 13 days).

The Board majority here disagreed that applying the unknown CBA was contrary to Deklewa, Slip op. at 3 n.7, because they suggest a contract might never be terminable, citing Sheet Metal Workers Local 2 v. McElroy's Inc., 500 F.3d 1093, 1095 (10th Cir. 2007), nothing said in Deklewa prohibits duration clauses requiring concurrent negotiation of successor contracts, and the MOA was extended by the subsequent 2013-2015 association CBA. These grounds are insufficient

First, the Board majority fails to explain why application of the 2013-2015 CBA was not upon an "unwitting employer" under Deklewa. Second, the court in McElroy's, Inc. was concerned with applying an interest arbitration clause requiring an employer to continue to negotiate for a follow-on contract with the union, and not, as the majority's language suggests, a prehire contract that could prohibit repudiation. Third, the majority did not try to address the Chairman's contractual problem that language in the MOA was illusory, and therefore unenforceable. Fourth, the contractual obligations are entirely uncertain.

3. The Board's Interpretation Imposes Illusory Contract Terms to Create an Artificial Statutory Violation Contrary to Supreme Court Case Law.

a. Principles of Contract Law Not Considered.

The Supreme Court's Decision chastised the Sixth Circuit for construing contracts contrary to "other traditional principles of contract law,"135 S. Ct. at 936, "including the illusory promises doctrine." The Board must follow the same rules and construe the entire contract, not just individual terms. It has yet to do so.

b. The Board Failed to Address Applicable Principles of Contract Law.

(1) Illusory Promises. Other traditional principles include "the illusory promises doctrine [which] instructs courts to avoid constructions of contracts that would render promises illusory because such promises cannot serve as consideration for a contract." Id. at 933, 936 citing R. Lord, Williston on Contracts (4th ed. 2012).

(2) Easy Identification of Secondary Document. Another traditional principle includes the secondary document doctrine "in the law of contracts that, in order to incorporate a secondary document into a primary document, the identity of the secondary document must be readily ascertainable." Hertz Corp. v. Zurich Am. Ins. Co., 496 F. Supp.2d 668, 675 (E.D. Va. 2007), citing Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 447 n.10 (3d Cir.2003) ("Incorporation by reference is proper where the underlying contract makes clear reference to a separate document, the identity of the separate document may be ascertained, and incorporation of the document will not result in surprise or hardship."); PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1201 (2d Cir.1996) ("[I]n order to uphold the validity of terms incorporated by reference it must be clear that the parties to

the agreement had knowledge of and assented to the incorporated terms.").

"As long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document...." 11 R. Lord, Williston on Contracts § 30.25 (4th ed. 2015). "Additionally, in order to uphold the validity of terms incorporated by reference, it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms...." Id. If an alleged incorporated document cannot be identified by title or date, it is ambiguous. BBJ, Inc. v. MillerCoors, LLC, 2015 WL 4465410 *6 (D. Mass. July 21, 2015) ("In order for a document to be incorporated into a contract by reference, 'the document to be incorporated [must] be referred to and described in the contract so that the referenced document may be identified beyond doubt.'" (citations omitted)). No such document existed at signing.

(3) Ready Availability of Secondary Document. A third traditional principle requires the document to be incorporated must also be readily available. World Fuel Servs. Trading v. Hebei Prince Shipping Co., 783 F.3d 507, 519 (4th Cir. 2015). "It must be certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship." Covol Fuels No. 4. v. Pinnacle Mtn. Co., 785 F.3d 104, 114 (4th Cir. 2015). Here, this principle was violated; no such document existed.

(4) No Right to Unilateral Modification. A fourth traditional principle of "black letter contract law" is a party to a contract does not have the right to unilaterally modify it. Kuhne v. Florida Dept. of Corrections, 745 F.3d 1091, 1096

(11th Cir. 2014). Courts will not infer such right "absent the clearest evidence." Id.

(5) Unilateral Contract Rights Usual Found Illusory. A fifth traditional principle arises when unilateral modification rights are granted by contract. Those clauses are usually found to be illusory or unconscionable. Ingle v. Circuit City Stores, 328 F.3d 1165, 1179 (7th Cir. 2003); Carroll v. Stryker Corp., 658 F.3d 675, 683 (7th Cir. 2011) (illusory); Morrison v. Amway Corp., 517 F.3d 248, 255 (5th Cir. 2008) (illusory); Dumais v. Am. Golf, 299 F.3d 1216, 1219 (10th Cir. 2002) ("unfettered right to alter the []agreement's existence or its scope is illusory").

Each of these principles are determinative, but the Board failed to consider any of them. Reconsideration is necessary to correct construction of the documents.

B. The MOA's Incorporation of Non-Existent CBAs is Illusory and Does Not Bar the Duration Clause Set Forth in the 2008-2012 CBA.

The Board's Decision interprets the MOA to arrest operation of the duration clause in the 2008-2012 CBA and to impose an associational CBA entered by the Union in 2013 upon Taylor Ridge from January 1, 2013 to December 31, 2015. Doing so violates traditional principles of contract law because it vitiates the renewal provision in the 2008-2012 CBA, improperly imposes a nonexistent document upon the parties at the time of signing the MOA and CBA, and utilizes a process that is illusory to reach its conclusion.

Here, Taylor Ridge provided sixty days notice of termination of the 2008-2012 CBA (on October 30, 2013), R. Ex. 1, and termination of the MOA (on January 23, 2014), R. Ex. 7, called for in both contracts.

The termination provision of the MOA signed by Local 309 and Taylor Ridge

on January 22, 2012, GC Ex. 19 ¶ 8, states:

> This Agreement shall remain in full force and effect through April 30, 2013, and shall continue thereafter unless there has been sixty (60) days written notice, by registered or certified mail, by either party hereto of the desire to modify and amend this Agreement for negotiations. The EMPLOYER and the UNION agree to be bound by the area-wide negotiated contracts with the various Associations, incorporating them into this Memorandum of Agreement and extending this Agreement for the life of the newly negotiated contract, if not notified within the specified period of time.

Paragraph 3 of the MOA contains a further limitation on its use:

> In the event that there is a conflict between this Agreement and the agreement of any local union in which the EMPLOYER may be performing work, the EMPLOYER agrees that the prevailing local agreement shall supersede this Agreement so far as it respects rates of pay, wages, hours of employment and other terms and conditions of employment.

The Board majority found the language of paragraph 8 applies to "area-wide negotiated contracts with the Associations, and these will be incorporated into the MOA." Slip op. at 3 n.7.[2] The majority's reliance on W.J. Holoway & Son, supra, and Neosho Constr. Co., supra, applying follow-on successor contracts involving discrete and single CBAs, violates traditional principles of contract law mandated now by the Supreme Court in M & G Polymers.

1. The Incorporation of Undated and Unnamed Contracts in the MOA is Illusory and Unenforceable.

The MOA violates traditional contract principles incorporating other

[2]The ALJ's resolved Respondent was not an association member, ALJD 10 ll.36-37. The ALJ did not explain how Section 3 of the MOA providing for a "prevailing" local agreement tp prevails over MOA imposed agreements applies.

documents into a contract which must be identified, available, and work no hardship on the surprised party. Another traditional "principle of contract law [is] that the written agreement is presumed to encompass the whole agreement of the parties. See 1 W. Story, Law of Contracts § 780 (M. Bigelow ed., 5th ed. 1874); see also 11 Williston § 31:5." M & G Polymers, 135 S. Ct. at 936. These contract principles apply to collective bargaining agreements. Id. at 937.

The Board has recognized the need to apply ordinary contract principles to collective bargaining agreements under M & G Polymers. In Hawaiian Telecom, Inc., 365 N.L.R.B. No. 36 at 3 (2017), the Board agreed it had applied these principles in that case to allow accrued benefits consonant with M & G Polymers based on "the plain language of the agreement." At bar, the Board looked to the durational provision and not traditional contract principles to reach its conclusion.

a. The Board's Finding the MOA Incorporated the 2013-2015 CBA Adopts an Illusory Document in Violation of Traditional Contract Principles Required by M & G Polymers.

The MOA does not incorporate the 2013-2015 CBA or any other area wide agreement as the Board majority claims because these agreements are not identified and did not exist when the MOA was signed. Moreover, the signing of the 2013-2015 CBA was accomplished by the Union without the employer's knowledge.

The complete lack of limits on the MOA provision makes it illusory. The Board's implicit reading there are no limits on the Union's power to establish new rights and burdens on Taylor Ridge with a stream of new CBAs is imposed with no consideration in return.

The Restatement (Second) of Contracts § 77 (1981), limits the imposition of

new burdens on a party to a contract with the requirement of new consideration. "A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances...." The Board's interpretation places no limit on the power of the Union to contract with an unnamed list of entities, including "all other associations with whom the UNION" may reach agreement which are also unnamed, G.C. 19 § 2, and bind Taylor Ridge to all of them if the Union ever reaches an agreement with any of them.

Here, the MOA failed to properly incorporate additional contracts and impose them on Taylor Ridge in conformance with traditional principles of contract law. In the clearest sense, the Board majority erred as it utilized no traditional principles of contract law when it found the MOA extended to the 2013-2015 CBA. The lack of any resort to these principles in the face of the Chairman's dissent that the MOA provision rendered Taylor Ridge's termination rights "illusory," Slip op. at 9, is apparent and requires reconsideration.

Even more obvious is the MOA fails to identify the secondary documents to be incorporated. The only reference relied on by the Board majority is the MOA refers to "area-wide contracts" with "various associations." No specific CBA is identified. Nowhere in the MOA is the location of an example of an incorporated document identified. If the secondary document does not make a "clear reference to the document and describe[] it in such terms that its identity may be ascertained beyond doubt," it cannot be enforced. R. Lord, Williston on Contracts (4th ed,), §30:25 (2017). Cf. World Fuel Service Trading, 783 F.3d at 419 & n.6 (finding internet links identified in contract sufficient to incorporate documents). Here,

there is no linkage in the MOA to a specific future CBA to bind Taylor Ridge to.

Finally, if the MOA provides the Union the unilateral right to modify its CBA by contracting with third party employer associations, these conferred rights are illusory and unconscionable because Taylor Ridge provided no consideration to be bound to the new agreements. See Carroll v. Stryker Corp., 658 F.3d 675, 683 (7th Cir. 2011) (future contract term does not become illusory if acceptance of new term by party is voluntary). Because the Union is allowed to unilaterally modify the MOA and extend its term solely by the Union's choice to enter into unnamed "area-wide" agreements with named associations and unnamed "various associations," the term is illusory because Taylor Ridge was not given the "right to reject" the 2013-2015 CBA "by terminating the agreement." Pre-Paid Legal Services, Inv. v. Cahill, 171 F. Supp.2d 1219, 1223 (D. Okla. 2016). The right to reject is required to prevent an illusory finding. The unilateral right to modify contract as the MOA provides is also illusory because the right to provision of advance notice of future terms was not agreed to in the contract. Id. Here, the Union never provided Taylor Ridge notice of the existence of the 2013-2015 CBA.

Therefore, the 2013-2015 CBA was not properly incorporated into the MLA. The Board's failure to apply these traditional contract principles required by M & G Polymers is an extraordinary reason for granting the Motion for Reconsideration.

b. The Board is Required to Construe the Conflict Resolution Term of the MOA in Resolving the Applicability of its Adoption of Area Wide CBAs.

Because M & G Polymers requires the duration provision in CBAs be enforced and termination of all contractual relations to cease after proper notice of

termination, any tension within the MOA for this principle is reduced by paragraph 3 of the MOA. This contract term provides: "the prevailing local agreement shall supercede" it. Since the 2008-2012 CBA rolled-over into 2013, that CBA was admittedly in effect between the parties throughout 2013-as the parties adopted no other contract or agreed to adoption of a follow-on association contract.[3]

This conflict resolution provision in the MOA facially supercedes the Board's interpretation and was neither discussed nor applied by the Board. Labor contracts are to be construed as a whole under M & G Polymers., 135 S. Ct. at 936. Choosing to construe only Section 8 of the MOA and ignoring Section 3 of the MOA is not the correct manner to apply traditional contract principles. The Board's failure to apply this conflict resolution provision in interpretation of a labor contract is ground for reconsideration because it is required under M & G Polymers to be done and resolution of that determination may be controlling.

III. CONCLUSION

For the reasons stated above, the Board should grant Taylor Ridge's Motion for Reconsideration, reinstate the 2008-2012 CBA duration clause, find the MOA illusory, that CBA terminated under its terms, and dismiss the Complaint.

[3]Article 38 section 1 of the 2008-2012 CBA, titled "Duration and Termination," GC Ex. 2, provided: " This Agreement shall be in force and effect from January 1, 2008, through December 31, 2012, and shall renew from year to year, unless either party serves written notice upon the other of intent to modify or terminate the Agreement not less than sixty (60) days prior to any expiration date.

Respectfully submitted,

/s Michael E. Avakian
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January 16, 2018

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Respondent's MOTION FOR RECONSIDERATION was efiled to the Executive Secretary's Office and emailed to the following persons on this the 16th day of January 2018:

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